Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD A. HEILPRIN,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEY'S PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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QUESTIONS PRESENTED FOR REVIEW

1. IS THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT VIOLATED WHEN AN ATTORNEY IS DISCIPLINED FOR VIOLATING A PORTION OF HIS "ATTORNEY'S OATH" WHERE THE LANGUAGE OF THAT PORTION IS VAGUE, AMBIGUOUS AND DOES NOT SET FORTH REASONABLE AND ASCERTAINABLE STANDARDS OF PROFESSIONAL CONDUCT?

2. DID THE WISCONSIN SUPREME COURT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT WHEN THEY REVOKED PETITIONER'S LICENSE TO PRACTICE LAW BASED SOLELY ON GROUNDS WHICH PETITIONER HAD NOT BEEN INFORMED OF AND HAD BEEN GIVEN NO OPPORTUNITY TO DEFEND AGAINST?

PARTIES TO THE PROCEEDING

Attorney Richard A. Heilprin, 905 15th Avenue East, Seattle, Washington, 98112, appeared on his own behalf.

Attorney Michael Riley; Atterbury, Riley, Luebke and Pretto, S.C., 411 West Main Street, Madison, Wisconsin, 53703, appeared on behalf of Mr. Heilprin.

Attorney Kitty Brennan; Murphy & Brennan, 1334 Milwaukee Avenue, Post Office Box 308, South Milwaukee, Wisconsin, 53712-0308, appeared for the Board of Attorney's Professional Responsibility.

Timothy L. Vocke, Referee, Reserve Judge, State of Wisconsin, Post Office Box 1416, Rhinelander, Wisconsin, 54501.

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STATEMENT OF GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOKED

The judgment petitioned for review was entered on May 5, 1992. The statutory provision relied upon which confers jurisdiction to review said judgment by writ of certiorari is 28 U.S.C. § 1257 (1988). The constitutional provision involved in the case and relied upon by petitioner is the Due Process Clause of the U.S. Cons. amend. XIV, § 1, "...nor shall any State deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

This petition for review arises from a disciplinary proceeding against Richard A. Heilprin, commenced by the filing of a Complaint and Order to Answer in the Supreme Court of Wisconsin on March 12,

1990. The Complaint and Order to Answer were filed by the Board of Attorneys Professional Responsibility of the State of Wisconsin.

The complaint alleged that Mr. Heilprin, then an attorney licensed to practice law in Wisconsin, had violated WI SCR 20:8.4(g) (then WI SCR 20.04(1)) of the Wisconsin Code of Professional Responsibility by engaging in "offensive personality" contrary to the Attorney's Oath, WI SCR 40.15 (then WI SCR 40.13). (See Appendix.) The alleged violations occurred in separate instances involving a Mrs. Tate and a Mrs. McSherry. Both Tate's and McSherry's complaints were consolidated in the Board's complaint and were respectively enumerated as the First and Second Causes of Action.

Both the Tate and McSherry portions of the complaint were based solely upon the "offensive personality" language found in the Attorney's Oath. That language states that an attorney shall "abstain from all offensive personality." WI SCR 40.15 (then WI SCR 40.13). WI SCR 20:8.4(g) (then WI SCR 20.04(1)) prohibits that conduct by reference, stating that "[i]t is professional misconduct for a lawyer to...(g) violate the attorney's oath."

Both causes alleged that Mr. Heilprin had made inappropriate sexual comments to the women during their individual office conferences with him. The complaint also alleged that Mr. Heilprin had represented a client which allegedly resulted in a conflict of interest in violation of WI SCR 20:1.7(b) (1988) (then WI SCR 20.24(1)) and

WI SCR 20:1.8(j) (1988) (then WI SCR 20.26(1)).

Following the complaint's filing, the Board did not add or seek to add additional violations or charges against Heilprin.

The Honorable Timothy Vocke was appointed Referee and an Answer and a Motion to Dismiss incorporating several affirmative defenses were later filed by Attorney Heilprin. As one of those affirmative defenses, Mr. Heilprin argued that the language proscribing "offensive personality," which formed the basis for two of the three charges against him, was so vague and indefinite as to fail to put him or any other attorney on adequate notice as to what kind of conduct was prohibited. (See Appendix, "Report and Recommendation of Referee.")

A final hearing on the charges was held on March 19, 1991 and continued through March 21, 1991. The Referee issued his report and recommendation on April 24, 1991, ruling that no violation occurred regarding the conflict of interest charge. Regarding the Tate and McSherry portions of the complaint, the Referee found that Mr. Heilprin had made the inappropriate sexual remarks Tate and McSherry alleged and that this conduct constituted "offensive personality" and as a matter of law, violated the Attorney's Oath. The Referee dismissed Mr. Heilprin's constitutional challenge to the sufficiency of "offensive personality" as a standard on which to base discipline as well as his other defenses. The Referee thereafter recommended Mr. Heilprin's license to practice be suspended

for 18 months. (See Appendix, "Report and Recommendation of Referee.")

Mr. Heilprin subsequently appealed from the Referee's report to the Wisconsin Supreme Court asserting again, in part, that the "offensive personality" language of the Attorney's Oath was unconstitutionally vague and did not provide an appropriate basis for discipline. (See Appendix, "Brief of Appellant.") The court adopted the Referee's findings of fact concerning Heilprin's conduct but, contrary to the Referee's conclusion that such conduct violated the Attorney's Oath, summarily concluded that Heilprin's actions instead violated a standard of attorney conduct allegedly set forth in their 1973 decision, Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878

(1973) and revoked his license to practice on that ground. (See Appendix, State v. Heilprin,") The violation of the alleged standard of conduct set forth in Heilprin, id., was not a basis for any portion of the charges originally brought against Heilprin in the Board's complaint nor had it been raised at any point in the proceedings prior to the court's decision.

The court chose not to address the issue of whether "offensive personality" constituted an appropriate basis on which to revoke an attorneys license to practice. The court felt it unnecessary to address Mr. Heilprin's vagueness argument and instead elected to invoke the standard assertedly set forth in its prior decision involving Attorney Heilprin, although that decision had not been alleged or relied

upon by the Board as a basis for this disciplinary proceeding.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI AS THE WISCONSIN SUPREME COURT HAS DECIDED AN ISSUE IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT

That portion of the 14th Amendment of the United States Constitution which petitioner relies upon prevents a State from "depriv[ing] any person of life, liberty or property without due process of law." U.S. Cons. amend. XIV, § 1. The proscription against "offensive personality" contained in the Wisconsin Attorney's Oath is unconstitutionally vague and ambiguous because it requires that men of common intelligence guess at its meaning and affords no reasonable standard for

agreement as to its application.

Petitioner moreover asserts that his Due Process rights were unconstitutionally impaired when the Wisconsin Supreme Court disciplined him based on an alleged standard of conduct which was neither contemplated nor addressed by the Board, the Referee or Mr. Heilprin. The Board's complaint involving Tate and McSherry alleged only that Heilprin violated the Attorney's Oath by engaging in "offensive conduct." It was this issue which was contested by the parties and decided by the Referee. It was this issue which afforded the only grounds for the court's consideration in reviewing the Referee's findings of fact, conclusions of law and disciplinary recommendation. Petitioner asserts that the court's ex post facto decision to discipline Heilprin based on

grounds other than those he had been apprised of and had an opportunity to defend against, violated the Due Process Clause of the 14th Amendment and is contrary to the prior decisions of this Court.

II. THE DEPRIVATION OF ADEQUATE NOTICE AND AN OPPORTUNITY TO DEFEND IS A DENIAL OF DUE PROCESS

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 16, 68 S.Ct. 836 (1948).

A. The Attorney's Oath Proscribing "Offensive Personality" is Unconstitutionally Vague, in That it Fails to Set Forth Reasonable and Ascertainable Standards of Professional Conduct

Though the lower court did not address this issue, petitioner asserts that the

constitutionality of the "offensive personality" language of the Oath was the proper issue on appeal and hence is discussed here.

The Wisconsin Attorney's Oath reads in part that, "I will abstain from all offensive personality." Such conduct is incorporated by reference under WI SCR 20:8.4(g) (then WI SCR 20.04(1)) which states that "[a] lawyer shall not violate a disciplinary rule or the attorney's oath." Imposition of discipline based solely on "offensive personality" does not comport with the language or the spirit of the decisions of this Court. The Board seized upon that language to impose discipline based upon the broadest possible language in the Oath and which finds no equivalent in SCR 20, which sets forth the Rules of Professional Conduct for

Attorneys. The Court's ruling in this case will determine whether not only Mr. Heilprin, but any attorney can be subjected to discipline solely for violating the broad aspirational language of a professional oath which provides no further guidance as to its intention or reach.

The particular language relied upon by the Board is couched in terms that are more appropriate for setting goals than setting standards. While portions of the Oath may fairly be viewed as setting forth minimal standards, that can scarcely be said of the reference to "offensive personality." The ambiguity of this standard effectively deprives attorneys of notice of what constitutes "offensive personality" despite the fact that this lack of notice does not immunize them from punishment should they be unfortunate enough to act in what a

particular court may deem "offensive." Adequate notice of what conduct is prohibited is "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1925). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Id.

If lawyers are to be judged and found wanting based upon offensive personality, what limits are to be set upon that judgment? Is the use of strong, if not sexually explicit language to be a fit subject for discipline? Will the recounting of jokes which do not meet the

current standards of good taste or restraint subject the teller to suspension? Many of us exhibit personal foibles that may be offensive to others, and most have taken offense at the speech or conduct of other lawyers on more than one occasion. In each instance where offense is given or taken, are we placed in peril of discipline? The language of the Oath provides no guidance on any of these issues and such an amorphous standard should not be used to so broadly proscribe and severely punish conduct.

B. Petitioner Was Denied Due Process of Law When the Lower Court Revoked His License to Practice Law Based Solely on Grounds Which He Had Not Been Informed of and Had Been Given No Opportunity to Defend Against.

The lower court denied Mr. Heilprin due process when they imposed discipline based on the violation of a standard not

otherwise raised and defended against in the prior proceedings. In its opinion, the court stated:

> "We adopt the referee's findings of fact concerning Attorney Heilprin's conduct but, contrary to the referee's conclusion of law that such conduct violated the Attorney's Oath, we conclude that it violated that very standard of attorney professional conduct enunciated in 1973 in a case involving this same attorney, Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878 (1973)." Disciplinary Proceedings Against Heilprin, 168 Wis. 2d 1, 482 N.W. 2d 908 (1992).

The court, perhaps mindful of the shortcomings of "offensive personality" as a standard for discipline, simply abandoned that standard and substituted an undefined standard which had not been cited or relied upon at any point in the proceedings. In doing so, the court deprived Attorney Heilprin of any notice or meaningful

opportunity to defend himself as required by the 14th Amendment. The violation of the undefined standard enunciated in Heilprin, (1973) (See Appendix) was not a ground upon which the Board's complaint was based. There is no evidence that either the Board or the Referee ever asserted that Heilprin's conduct violated that "standard" or that the prosecution of Mr. Heilprin was in any way based upon it. The decision of the court to impose discipline upon Mr. Heilprin based upon a standard which was never asserted in the course of the disciplinary proceedings and which Heilprin was never permitted to address is violative of fundamental due process requirements.

Regarding the requirements of due process, this Court has stated that:

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in

> order that they may enjoy that right they must first be notified...It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1971).

In the case at hand, the alleged violation of the standard of conduct set forth in Heilprin, (1973) for which Mr. Heilprin was here disciplined was disclosed only through the court's decision. Prior to this, Mr. Heilprin had no knowledge and had no reason to believe that the charges against him and the potential for discipline were to be based on the violation of an entirely different standard than that asserted and relied upon by the Board and defended against by Attorney Heilprin. Because Mr. Heilprin had no notice of the charges on which the court chose to base its discipline, Attorney

Heilprin had no meaningful opportunity to defend himself. All of the decisions taken concerning how to conduct his defense were rendered meaningless when the court chose to substitute its own "standard" of conduct after the fact.

Moreover, the standard of conduct relied upon by the court and allegedly set forth in Heilprin, (1973), does not adequately describe conduct which will or will not be punished. In that case, the complaint filed by the Board of State Bar Commissioners sought the discipline of Mr. Heilprin for various occasions when he had created disturbances in a court clerk's office, threatened and accused the personnel therein of dereliction and dishonesty, of making threatening phone calls and sexual misconduct involving clients. The complaint specifically sought

to punish Heilprin for "unprofessional conduct" and he was eventually disciplined on that ground. Heilprin, 59 Wis. 2d at 313.

The Supreme Court of Wisconsin affirmed the Referee's findings that Heilprin had engaged in "unprofessional conduct" and that his license to practice should be suspended until he had recovered from a medical condition which was found to be the cause of his conduct. The opinion fails to specifically describe any standard of conduct that Heilprin violated and which attorneys should be warned against. The court merely writes that "conduct of the type engaged in by Heilprin cannot be condoned." Id. at 322. The court in its present decision made no effort to more specifically define or enunciate the "standard" on which it relies. This

general admonition falls far short of the certainty and clarity required for a prohibitory rule to pass constitutional muster.

In the 1973 case, Heilprin was found to have engaged in acts of harassment, verbal abuse and sexual misconduct. The court stated that conduct of "th[is] type...cannot be condoned." Id. The court did not specify which acts or combination of acts formed the basis for its decision.

The 1973 case actually focused on a defense based on medical incapacity and was clearly not intended to set standards or conduct. The court's attempt to rely on the case as providing such standards is misplaced. The constitution requires fair notice of acts which are prohibited as well as clear standards by which persons will be judged to have engaged in them. The case

relied on, even if timely raised, does not pass muster.

Moreover, the lower court's reliance on Heilprin, (1973) is incorrect. Heilprin involved a disciplinary proceeding based upon allegations of "unprofessional conduct." The proceedings were brought pursuant to sec. 256.28, Wis. Stats (1972), Attorneys; Admission to Practice. (See Appendix.) Interestingly, that section merely outlines the procedures whereby attorneys were licensed and admitted to the Wisconsin Bar and did not list duties or standards of conduct required of those admitted. The section does not list general or specific types of conduct for attorneys to aspire to or to avoid. The section also omits any type of punishment or disciplinary proceedings for violations of the rules of conduct in that day. The

sheer lack of any modicum of rules, requirements, guidelines or punishments within the statute upon which the earlier Heilprin proceedings and standard of conduct were allegedly based, wholly undercuts the reasoning and propriety of the recent Heilprin court's reliance upon it.

Finally, the conduct which Mr. Heilprin's discipline is based in the present case is substantially different than that for which he was disciplined in Heilprin, (1973). There are no allegations here of the pattern of threats and harassment which were relied upon in the earlier proceeding. There was no contention here of specific sexual conduct which would be proscribed under the criminal code. The only allegations in the present case relate to off color and

inappropriate remarks. The factual discrepancies between the two cases further highlight the impropriety of the court's application of the Heilprin (1973) "standard" to the case at hand.

Ultimately, the disciplinary system must stand the test of fundamental fairness. There are ample tools at the system's disposal to accomplish its ends within those bounds. It is incumbent upon the system as part of our broader system of justice to maintain those standards of fundamental fairness upon which all citizens rely for protection. An erosion of those standards in proceedings authored and governed by the arbiters of fairness in our system undermines the very foundation of that system. To permit discipline to be based on vague standards substituted after

the fact would undermine the basic principle of notice and fair play.

III. THE COURT SHOULD PROTECT PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS AND GRANT THE WRIT OF CERTIORARI

The Referee's report noted that the Supreme Court of Wisconsin has the authority to determine who it deems fit to practice law within the state. Although the court does have the inherent power to discipline their attorneys, that power does not exempt them from the requirements of the Constitution. This Court has specifically mandated that a lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process, which includes fair notice of the charge. In re Ruffalo, 390 U.S. 544 (1967).

In Ruffalo, an Ohio lawyer was charged with 12 counts of misconduct by the Ohio

Board of Commissioners. At the hearings before the Board, a 13th charge was added stemming from testimony given at those hearings by Ruffalo and one Orlando, whom Ruffalo had at some earlier point employed. The Board eventually found Mr. Ruffalo guilty of seven counts of misconduct, including the later added charge, No. 13. On review, the Ohio Supreme Court affirmed the conviction based solely on Ruffalo's violation of charge No. 13 and one other charge. The Federal District Court, after ordering Ruffalo to show cause why he should not be disbarred, found that there was no misconduct. The Court of Appeals similarly ordered Ruffalo to show cause why he should not be stricken from the roll based on Ohio's disbarment order. Id. at 545.

Relying solely on the Ohio court's record and findings, the appellate court held that only charge No. 13 justified Mr. Ruffalo's disbarment in that court. This Court reversed the appellate court. It held that because Ruffalo had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified, the procedure against Ruffalo was wanting in due process.

In deciding the case, the court at p. 550 stated that:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer, Ex parte Garland, 4 Wall. 333, 380 (1866) (other citations omitted)... [and] [h]e is accordingly entitled to procedural due process, which includes fair notice of the charge. In re Oliver, 333 U.S. 257, 273 (1948)."

The Court held that in this case, Ruffalo had no notice that his employment of Orlando would be considered a disbarment offense until after the Board's complaint was filed and after both he and Orlando had testified at length. Ruffalo, at 551. The Court emphatically stated that:

> "[T]he charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." Id.

This Court concluded that the absence of fair notice as to the precise nature of the charges against him deprived Ruffalo of procedural due process. Id. at 552.

The denial of procedural due process in the present case is more egregious than in Ruffalo. The charge against Ruffalo which ultimately served as the basis of his appellate disbarment, was brought during the proceeding following Ruffalo's and

Orlando's testimony, Heilprin's alleged violation of the asserted standard set forth in Heilprin, 59 Wis. 2d 312 (1973) was not disclosed as a basis for his discipline until after the Wisconsin Supreme Court had made and filed their decision, giving Heilprin no chance to defend himself against it. The trap which snared Mr. Heilprin was more insidious than that which this Court found unacceptable in Ruffalo, since the grounds for discipline were not disclosed until the reviewing court's decision was released. Mirroring the failings of the Ruffalo appellate court, the Wisconsin court failed to take any additional evidence concerning Heilprin's alleged violation of this new standard and relied entirely on the Referee's findings of fact. Attorney Heilprin has had no opportunity prior to

this time to address these issues or to offer a defense.

The Wisconsin Supreme Court elected to discipline Heilprin based on a standard of conduct which it did not define and which served no part in the disciplinary proceedings. In doing so, the court effectively deprived Mr. Heilprin of the opportunity to defend himself against defined and definable charges which is central to our concept of due process.

CONCLUSION

Petitioner respectfully requests the Court for a Writ of Certiorari to the Wisconsin Supreme Court to review that court's failure to comply with the procedural due process requirements of the 14th Amendment. The scope of the lower court's review of this case should have

been limited to two matters: 1) Whether the proscription against "offensive personality" is unconstitutionally vague and ambiguous and if not, 2) Whether Heilprin violated the Attorney's Oath by engaging in "offensive personality" and whether the degree of discipline based on the violation of that standard alone was appropriate and constitutional.

By avoiding review of the above issues and basing Heilprin's discipline on charges previously unknown to him, the court deprived Mr. Heilprin of notice and any opportunity to defend himself against the charges for which he was disciplined as required by the Constitution.

Respectfully resubmitted this 18 day of August, 1992.

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